STATE OF MICHIGAN

COURT OF APPEALS

STEVEN PURDY,

Plaintiff-Appellee,

v

CHRISTOPHER JOHN BERNAICHE,

Defendant,

and

BABAR & ABRAHAM, INC., a/k/a DRINKS SALOON,

Defendant-Appellant.

UNPUBLISHED
June 13, 2006

No. 256730
Wayne Circuit Court
LC No. 03-306683-NO

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant-appellant Babar & Abraham, Inc., also known as Drinks Saloon (hereinafter defendant), appeals by leave granted the trial court's order denying its motion for partial summary disposition under MCR 2.116(C)(8) and (10). We affirm.

Viewed in the light most favorable to plaintiff, the evidence indicates that Christopher Bernaiche and another patron at defendant's bar argued and that defendant's employees intervened. An altercation between Bernaiche and these employees ensued, and defendant's employees ejected Bernaiche from the bar. There is evidence that some involved in controlling and ejecting Bernaiche may have used excessive force. At least two of defendant's employees heard Bernaiche make a threat when the altercation ended, to come back and kill one or more of the people involved in the melee. Defendant's manager, George Abraham, did not hear Bernaiche's threat but called the police because he was concerned that Bernaiche might damage cars in the parking lot. After placing the call, Abraham saw Bernaiche drive out of the parking lot. Abraham again called the police and advised that Bernaiche had left. The police records indicate that Abraham advised that a police car was not necessary to respond. Bernaiche returned to the bar within the hour. He then shot five individuals, killing two and wounding plaintiff and two others.

Plaintiff sued Bernaiche for assault and battery and alleged claims against defendant for a dram shop violation and common-law negligence. Plaintiff's amended complaint alleged that defendant was negligent for failing to provide reasonable security, failing to employ staff and have appropriate procedures to respond, "failing to call the police (and, in fact, canceling a call to the police)," failing to inform the patrons of Bernaiche's threat, failing to seek police surveillance or provide door security upon becoming aware of the threat, and failing to timely intervene. Plaintiff also claimed that defendant was negligent "in physically engaging and/or otherwise inappropriately escalating an exchange with [Bernaiche]; to wit, violently throwing him from the building and beating him, so as to intentionally aggravate, agitate, and upset him, causing and/or contributing to his anger and actions of retaliation, i.e., the shooting incident . . . ."

Defendant moved for partial summary disposition under MCR 2.116(C)(8) and (10) with respect to the negligence claim only. Defendant argued that with respect to criminal acts of third parties, a business owner only has a duty to respond, and the duty is limited to calling the police. Relying on *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001), and our Supreme Court's peremptory reversal in *Smith v Hamilton's Henry VIII Lounge, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2002 (Docket No. 231031), rev 468 Mich 885; 661 NW2d 234 (2003), defendant argued that it discharged its duty to respond when its employee Abraham called the police.

The trial court denied defendant's motion and explained that it was not satisfied that defendant discharged its duty:

> If Mr. Bernaiche left the bar and said I'm going home or left the bar without saying anything except cursing the patrons out and so forth, that would be one thing, but when he left and threatened to either kill one person or kill them all; in other words, that he's coming back to get one or more persons, that's when there was a duty not to rescind the initial phone call, but to make a phone call. The threat left temporarily because he told everybody he was going to come back and do some damage and he did exactly that. Forget whether or not employees of the defendant beat the plaintiff [sic, Bernaiche], at least for the purposes of this motion. I'm not satisfied that the defendant fulfilled its duty under *Mason* or under, was it *MacDonald v*[] *PKT* or even under *Williams v*[] *Cunningham Drug Stores* case to summon the police. I'm not satisfied that that actually occurred in this case.

On appeal, defendant argues that the trial court erred in denying its motion because any duty owed to plaintiff was discharged when it contacted the police. Although defendant's motion was brought under MCR 2.116(C)(8) and (10), because the trial court considered evidence outside the pleadings, we will review this decision under the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). We review de novo a trial court's decision to grant or deny summary disposition. *MacDonald*, *supra* at 332. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Id*. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Id*.

A prima facie case of negligence requires a plaintiff to prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the breach was a proximate cause of the plaintiff's damages, and that the plaintiff suffered damages. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999). Questions about whether a duty exists are for the court to decide as a matter of law. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). In this regard, Michigan courts distinguish between misfeasance, i.e., "active misconduct causing personal injury," and nonfeasance, i.e., "passive inaction or the failure to actively protect others from harm." *Id*. at 493, quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988). In general there is no legal duty obligating one person to protect another from the criminal acts of a third party absent a special relationship between the plaintiff and the defendant or the defendant and the third party. *Graves, supra* at 493. A special relationship exists between a business invitor and business invitees. *Id*. at 494.

Nonfeasance

In *MacDonald*, our Supreme Court reconciled previous decisions that addressed a merchant's duty to protect invitees from criminal acts of third parties. *MacDonald* and its companion case involved injuries that occurred at outdoor concerts where unruly patrons threw sod, and there was evidence that sod-throwing had occurred at previous concerts. Despite the fact that the defendant was aware of these prior incidents, the Court did not conclude that a merchant or premises owner has a duty to take precautions against criminal conduct because the conduct may be reasonably anticipated, based on prior incidents. *Id*. at 334 n 10. Rather, the Court emphasized that the merchant's duty is limited to *responding* reasonably to a situation presently occurring on the premises. *Id*. at 335. "A merchant can assume that patrons will obey the criminal law." *Id*. "This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. The Court recognized that the issue of what constitutes a reasonable response is typically a matter for the trier of fact, but explained that where there are overriding public policy concerns, the Court may determine the issue as a matter of law. *Id*. at 336. With respect to the situation at issue, the Court concluded that, "as a matter of law, fulfilling the duty to respond requires only that a merchant make reasonable efforts to contact the police." *Id*. The decision in *MacDonald* is significant insofar that it clarifies what triggers the duty (a present situation) and what fulfills it (reasonable efforts to contact the police).

Defendant relies on *MacDonald* to support its argument that the trial court erred in denying its motion for partial summary disposition. However, the trial court's reasoning was consistent with *MacDonald*. Unlike the plaintiffs in *MacDonald*, plaintiff is not claiming that defendant had a duty to anticipate harm based on prior incidents of criminal activity. Instead, the alleged duty to alert the police is based on Bernaiche's threat. While not completely uncontradicted, there is some evidence that Bernaiche made the threat to everyone in the bar, including plaintiff. Although Bernaiche did not actually return to the bar for some time, it is the perceived imminence of the threat which is of import; i.e., whether Bernaiche's threatened return could reasonably be perceived to be imminent. That depends upon the factual context and manner in which Bernaiche made the threat. If a reasonable person hearing the threat would conclude that Bernaiche was serious, and that harm to those in the bar, including plaintiff, was imminent, defendant's duty to respond would have been triggered. While there was evidence

from one of defendant's employees that the threat did not appear to be serious, there was also evidence from other employees to the contrary.

Further, although defendant called the police while Bernaiche was still on the premises, there is also evidence that, after Bernaiche left the scene, defendant called the police back and informed them that no response was necessary. Because the foreseeable and imminent threat would have been Bernaiche's return, we conclude that, contrary to defendant's contention, canceling the police involvement as soon as Bernaiche left the scene would arguably fall short of the "reasonable efforts to contact the police" required by *MacDonald*. *Id*. at 336.

Misfeasance

Defendant also relies on our Supreme Court's peremptory reversal in *Smith*, *supra*, to argue that, if defendant did not fail in its duty to properly contact the police, it cannot be held liable for misfeasance, even if the way defendant treated Bernaiche was a proximate cause of his return and the inquiries resulting. However, the Supreme Court order relied upon states, in full, that:

> A merchant has no obligation to anticipate the criminal acts of third parties. *MacDonald v PKT, Inc*, 464 Mich 322 (2001). Inasmuch as defendant reasonably expedited the involvement of police and police arrived at the scene two to three minutes after the incident, defendant fulfilled its obligation under *MacDonald*. [*Smith, supra* at 885.]

We do not conclude that this order, limited to the nonfeasance question, can be properly construed as a *sub silento* abrogation of misfeasance principles in this context. See, e.g., *Ross v Glaser*, 220 Mich App 183, 186-187; 559 NW2d 331 (1996); *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 530-532; 534 NW2d 181 (1995).

Proximate Cause

Defendant briefly argues that evidence of proximate cause is lacking. However, proximate cause is generally a factual issue to be decided by the trier of fact. See *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). In this case, proximate cause would depend, in large part, on what actions the police would have taken had their dispatch to the scene not been aborted. Defendant makes bald assertions regarding what action would have been taken had police arrived, but offers no evidence in support. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 366; 533 NW2d 373 (1995). Further, discovery on this issue is not complete. *Ransburg v Wayne Co*, 170 Mich App 358, 360; 427 NW2d 906 (1988). Defendant has failed to establish that the proximate cause issue should be decided as a matter of law.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper